

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANTHONY GAINES)	
Claimant)	
)	
VS.)	
)	
GOODYEAR TIRE & RUBBER CO.)	
Respondent)	Docket No. 1,011,594
)	
AND)	
)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 26, 2010, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on July 21, 2010. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. John A. Bausch, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant has a 30 percent permanent partial impairment to his right upper extremity but had a 0 percent psychological impairment related to his wrist injury. Further, the ALJ held that the medical treatment by Dr. Gilbert Parks was not authorized medical, and she denied claimant's request for an order that respondent be responsible for the payment of those bills as authorized treatment expenses.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the ALJ's findings concerning the nature and extent of his physical and psychological impairments. Claimant further requests that the Board find

the medical bills of Dr. Parks to be reasonable and necessary treatment for the work-related condition and order respondent to pay the same as authorized medical expenses.

Respondent asks that the ALJ's Award be affirmed in its entirety.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's physical and psychological impairment?

(2) Should respondent be ordered to pay, as authorized, the medical bills incurred by claimant for the psychiatric treatment provided by Dr. Gilbert Parks?

FINDINGS OF FACT

Claimant began working for respondent on January 31, 2000. On April 4, 2002, he was working in the Radial Earth Movers department building large tires when he injured his right wrist. He was first told he had a muscle strain, but in September 2002 he was authorized to be treated by Dr. E. Bruce Toby, a board certified orthopedic surgeon. Dr. Toby performed three surgeries on claimant's right wrist. The first surgery was performed in November 2002, at which time Dr. Toby attempted to repair a ligament. After that surgery, claimant returned to his regular work duties, but because of continued swelling and pain, he was placed on light duty. Claimant returned to Dr. Toby in July 2004, and in August 2004, Dr. Toby did a right total wrist fusion. In performing this surgery, Dr. Toby removed bone from claimant's hip and put it in claimant's wrist, along with a titanium plate. Claimant said he again went back to full duties but because of the pain and swelling, he was unable to make his quota of building tires. He was eventually moved to the lab where the work is less physical. Later, the titanium plate in claimant's wrist started putting pressure on claimant's nerve, and his whole right arm got numb. So, in February 2005, Dr. Toby performed a third surgery to remove the plate in claimant's wrist.

Claimant still has a fused wrist, and he cannot bend his wrist at all. He said the fingers of his right hand still go numb, and he gets sharp pains in the area where the surgeries were performed. He testified that he also gets a sharp pain when he touches the scar on his right hip and that area of his right hip aches all the time. Claimant said that he was able to carry a gallon of milk but would not be able to rev up a motorcycle or throw or catch a baseball. Claimant said that he is left-handed and uses his left hand for most things.

On April 1, 2004, Dr. Toby rated claimant as having a 30 percent permanent partial impairment to the right upper extremity at the level of the forearm, based on the AMA

Guides.¹ Dr. Toby admitted that at the time he issued his rating, he had not seen claimant since February 18, 2004, and that he did not do a specific rating evaluation of claimant. However, he stated that rating a wrist fusion is simple and is based on the position of the wrist. He did not do range of motion testing because claimant has no range of motion in his wrist.

In performing claimant's wrist fusion, Dr. Toby took some donor bone from claimant's iliac crest, which is a little above the right hip. Dr. Toby did not believe that claimant suffered any permanent impairment as a result of the surgical procedure to remove the bone. Dr. Toby testified that generally speaking, subjective pain by itself does not result in a permanent partial impairment according to the *AMA Guides* unless there is a functional or structural cause. Dr. Toby did not recall claimant complaining about walking, running or anything of that nature. Dr. Toby also said constant pain in the area of a bone grafting is not a normal result of the procedure, and he has never seen it occur.

Dr. Daniel Zimmerman is board certified in internal medicine and is a certified independent medical examiner. He examined claimant twice at the request of claimant's attorney. He first saw claimant on December 30, 2003. Claimant gave him a history of his accident and medical treatment. Dr. Zimmerman had an x-ray taken of claimant's right wrist, which showed that claimant's wrist was nearly completely fused but that claimant had osteoarthritic change affecting the MP joint of the thumb. After performing a physical examination, Dr. Zimmerman found that as a result of his accident, claimant had severe range of motion restrictions, weakness and pain in his right wrist. Based on the *AMA Guides*, Dr. Zimmerman rated claimant as having a 51 percent permanent partial impairment to the right upper extremity at the wrist level. He explained that he gave claimant a rating of 30 percent based on grip strength loss and a rating of 30 percent for the fusion. Those percentages combined for a total of 51 percent permanent partial impairment to the right upper extremity at the wrist level. He converted this rating to a 31 percent rating to the body as a whole.

In addition to the right wrist injury, claimant complained of pain affecting the site from which the bone graft had been harvested. Dr. Zimmerman stated that normally graft sites on the iliac crest heal without any impairment. Dr. Zimmerman stated that there was no rating mechanism for such a condition in the *AMA Guides*, other than the pages regarding pain. Because claimant complained of pain in the iliac crest area, Dr. Zimmerman, using his reasonable medical judgment, opined that claimant sustained permanent partial impairment of the body as a whole of 1 percent. Dr. Zimmerman admitted that when he examined claimant on December 30, 2003, he did no testing of the graft site, and his rating at that site is based entirely on the fact that claimant told him he had pain there. This 1 percent rating for the iliac crest area, combined with the 31 percent

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

rating to the body as a whole for claimant's right wrist, computes to a total 32 percent permanent partial impairment.

Dr. Zimmerman found that claimant's right upper extremity was capable of lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis. He recommended that claimant avoid frequent flexion, extension, twisting, torquing, pushing, pulling, hammering, and reaching activities with the right upper extremity.

Dr. Zimmerman saw claimant a second time on May 15, 2005. Dr. Zimmerman said the only change between claimant's condition in December 2003 and May 2005 was that the hardware had been removed from the fused wrist.

Dr. Zimmerman had previously rated claimant's right wrist as having a 51 percent impairment based on loss of grip strength and the fusion. In a second deposition, Dr. Zimmerman testified that he erred in rating claimant's wrist for grip strength. Instead, he indicated he should have rated claimant's loss of range of motion. He said either way, however, claimant would have a 51 percent impairment to the wrist. Dr. Zimmerman said that a rating for a complete fusion of the wrist does not take into consideration the fact that he would have no range of motion of the wrist. He said the *AMA Guides* allow him to consider both the arthroplasties and range of motion. Dr. Zimmerman said claimant's range of motion improved a little after having the hardware removed in his wrist.

Dr. Zimmerman testified he continued to rate claimant as having 1 percent rating for pain at the iliac crest. He opined the pain was being caused by dysesthetic injury to the superficial nerves in the area where the bone harvest was taken. Dr. Zimmerman did not know from where on the iliac crest the bone was taken. Claimant did not point to or tell Dr. Zimmerman where he was feeling pain. When Dr. Zimmerman assessed claimant, he did not touch the area of the bone harvest, nor did he examine the area. Claimant just told him he had some pain there.

Dr. Zimmerman said claimant's restrictions as noted in his December 30, 2003, report continued to be appropriate. As far as future medical, Dr. Zimmerman said that after having had a fusion and then having the hardware removed, there was not much possibility of future surgical needs.

As well as claiming an impairment for injuries to his right wrist and iliac crest, claimant is claiming a psychological impairment based on emotional problems caused by his accident and injury. Claimant said that after the injury he was pretty sad. He believed he lost earning power because he could not physically do the work he had done previously.² That bothered him and led to anger, fear and a sense of worthlessness. He

² Cynthia Nace, respondent's Workers Compensation and Employee Benefit Manager, testified that claimant earned more after his accident than he was earning at the time of the accident. Nace Depo. at 6.

said he cried and had fits of anger. He does not feel whole because his body parts are not working the way they were before he was injured. He related all his emotional or psychological problems to his inability to do things and his pain.

Claimant said a coworker told him he needed help and suggested he see Dr. Gilbert Parks, who is board certified in psychiatry and neurology. Dr. Parks began treating claimant on June 30, 2003. Claimant told Dr. Parks he was depressed and that his life was turned upside down. Dr. Parks testified that claimant had undergone major changes in his personality in that he was more depressed, despondent, and irritable since the accident. Dr. Parks said claimant's depression worsened as he had more surgeries on his wrist. Also, claimant was having conflict within his family. Dr. Parks opined that if claimant had been functioning at 100 percent without the depression, he would have been better able to handle his rebellious teenage children and the conflicts between he and his wife. Within a week of first treating claimant, Dr. Parks began seeing claimant, claimant's wife and children as part of family therapy, as well as treating claimant individually.

Dr. Parks treated claimant from June 30, 2003, until February 20, 2008. In August 2007, the ALJ authorized Dr. James Eyman to treat claimant for his psychological problems. Claimant first saw Dr. Eyman on September 27, 2007. Claimant testified that he had problems getting along with Dr. Eyman after he told Dr. Eyman he was happy with Dr. Parks' treatment because Dr. Parks is a black man who can relate to his struggles. Dr. Parks testified that claimant told him Dr. Eyman did not understand that he was angry at being told to be treated by Dr. Eyman when he was not claimant's therapist of choice. Claimant began missing appointments with Dr. Eyman, and on July 9, 2008, Dr. Eyman terminated his treatment.

Dr. Parks was asked by claimant's attorney to render an opinion as to claimant's permanent partial psychological impairment. Dr. Parks met with claimant again on three occasions, once in December 2009 and twice in January 2010. Dr. Parks said claimant was still depressed and the depression was not going to improve because he is depressed about his injury and the sense of feeling deformed, and that situation would not change. Using the *AMA Guides*, Dr. Parks found claimant had a Class 3, moderate permanent impairment. He found claimant's collective impairment to be 25 to 50 percent. An average of that would be 37.5 percent, and Dr. Parks said claimant's impairment would be in that range, although he thought that claimant had more like a 40 percent impairment.

Dr. Parks said the records of claimant's treatment from 2003 forward are in his computer and that he did not keep a hard copy of his records. On the day of his deposition, his computer was not working so he could not make a hard copy of those records, although he was able to run off a copy of his bill for claimant's treatment from 2003 to February 20, 2008. The bill has separate codes for the therapy sessions that involved claimant's individual treatment and those that were family therapy sessions. However, with respect to what issues were discussed on any particular therapy session, there is no way of knowing by looking at the bill and Dr. Parks could not identify the subject

matter of any particular session. Dr. Parks said claimant was having conflict with his children concerning obedience, relations and chores. There was also, at some point, an issue when one of his stepdaughters accused him of molesting her. Dr. Parks said he had therapy sessions with claimant during that period of time, but he could not recall whether the sessions related in any way to the stepdaughter's accusations. Dr. Parks said the problems claimant was having concerning his work injury interrelated with the difficulties he was having with his family.

Dr. Parks said that claimant had problems with depression before his accident at respondent. Claimant had a drug problem in late adolescence and early adulthood, which was about the time he experienced the unexpected death of his brother.

Dr. Patrick Hughes, who is board certified in psychiatry and neurology, examined claimant twice, both times at the request of respondent. He first examined claimant on November 9, 2004, in relation to an injury he suffered at respondent. After that examination, he found no evidence that claimant was continuing to suffer from depression and opined that claimant was malingering. Also, he did not find claimant's self-reported posttraumatic stress disorder symptoms to be convincing. He opined that claimant had no psychiatric disability or impairment that precluded his return to work.

Dr. Hughes re-examined claimant on February 23, 2010. During that examination, Dr. Hughes said claimant was civil and pleasant, open and forthcoming in his answers. After the examination was finished, however, claimant began a personal diatribe with Dr. Hughes, first in his office, then in the hallway, and then in the doorway of the waiting room. Dr. Hughes said that confrontation had no effect on his opinions and observations in connection with the examination.

Claimant acknowledged to Dr. Hughes that his bad days occurred in the context of significant family pressures and discord with his wife and teenagers, as well as work pressures, especially changed job duties. Claimant no longer had disputes with coworkers or supervisors relative to his wrist and/or wrist pain. Claimant hardly mentioned his wrist during the evaluation, and then only in saying he accidentally smacked it while at work, which caused pain. Dr. Hughes could not detect from him any current psychiatric distress attributable to his long-ago wrist injury. It is Dr. Hughes' opinion that claimant has 0 percent psychiatric impairment or disability that can be causally attributed to his workplace injury.

Dr. Hughes believes that a properly conducted psychiatric examination begins with inviting the patient to spontaneously offer what is their most distressing symptoms, and the doctor follows up on those proffered complaints. He did not review claimant's regular hearing testimony about how his wrist affected him psychologically. He did not review Dr. Parks' clinical records or deposition testimony about the effects of the wrist injury on claimant's psychological condition. When Dr. Hughes asked claimant about his wrist injury, claimant said that it bothered him that his wrist hurt. Dr. Hughes stated that given claimant

barely mentioned his wrist throughout the evaluation, he did not go into details about claimant's anger in having had a wrist injury, about not being able to do certain jobs at work, and other emotional problems he was alleging.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

....
(12) For the loss of a forearm, 200 weeks.

....
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total

period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.A.R. 51-7-8(c)(4) states: "An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule."

The Kansas Supreme Court has long held that traumatic neurosis, as well as other psychiatric problems are compensable. "[W]e have held that traumatic neurosis *following physical injury*, and shown to be directly traceable to such injury, is compensable under the act."³ However, the court in *Berger*⁴ cautioned:

Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment.

In *Love*,⁵ the Kansas Court of Appeals stated:

In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et seq.*, the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.

A psychological injury is not compensable under Kansas law unless it is directly traceable to a work-related physical injury.⁶ A preexisting mental condition is treated like any other health condition and if a work related accident aggravates, accelerates or intensifies the condition it is compensable under the Workers Compensation Act.⁷

³ *Jacobs v. Goodyear Tire & Rubber Co.*, 196 Kan. 613, 616, 412 P.2d 986 (1966).

⁴ *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 550, 506 P.2d 1175 (1973).

⁵ *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

⁶ *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994).

⁷ *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P. 2d 469, *rev. denied* 265 Kan. 884 (1998).

ANALYSIS

Despite treatment, including three surgeries by Dr. Toby, claimant continues to have problems with his right wrist. Respondent has attempted to accommodate claimant's symptoms and limitations by altering his work duties. Dr. Toby rated claimant's permanent impairment as 30 percent to the right upper extremity. His rating was solely for the injury to claimant's wrist. Dr. Toby did not consider claimant's pain complaints to be entitled to a separate rating under the *AMA Guides* and did not consider the hip to be rateable due to it being the harvest site for the wrist bone graft. Dr. Zimmerman was of a different opinion and gave claimant a 1 percent whole body rating due to claimant's complaints of pain in the iliac crest area. In addition, Dr. Zimmerman rated claimant's wrist impairment as 51 percent. The Board finds the opinion of Dr. Toby more persuasive and finds claimant's permanent partial disability is a 30 percent scheduled injury to the forearm.

The Board further agrees that claimant failed to prove he suffered permanent psychiatric injury, impairment, or disability as a direct result of his work-related accident and physical injury. In this regard, the Board is persuaded by the opinions of Dr. Hughes over those of Dr. Parks. The ALJ's findings and conclusions concerning the nature and extent of claimant's disability are affirmed.

Claimant is also seeking payment of the bills from Dr. Parks as authorized treatment expenses. He sought treatment on his own with Dr. Parks. Although Dr. Parks treated claimant from June 30, 2003, until February 20, 2008, he was never authorized. Claimant did seek a change of physician and filed an Application for Preliminary Hearing in July 2003, but no hearing was held. A 7-day demand letter with a request for psychological treatment was made in December 2004, which was followed by another Application for Preliminary Hearing. As a result of claimant's application for a preliminary hearing, psychiatric treatment was awarded.⁸ Although claimant requested Dr. Parks, respondent authorized Dr. Mitch Woltersdorf to treat claimant's psychiatric complaints by letter of May 24, 2005. That authorization was later changed to Dr. Richard Maxfield.

Another preliminary hearing was held on May 9, 2007, which resulted in the ALJ ordering medical treatment with Dr. Melvin Berg. The ALJ's Order specifically provided: "Dr. Berg is authorized to make a referral to a M.D. for the purpose of prescribing psychiatric medications. Any such referral shall not be to Dr. Gilbert Parks."⁹

Dr. Berg declined to treat claimant because he had already performed forensic evaluations of claimant. The parties thereafter agreed on, and Judge Benedict approved,

⁸ *Gaines v. Goodyear Tire & Rubber Co.*, No. 1,011,594, 2005 WL 1046555 (Kan. WCAB Apr. 20, 2005).

⁹ ALJ's Order (May 10, 2007) at 1.

Dr. James Eyman to be claimant's authorized treating physician.¹⁰ Claimant failed to cooperate in his treatment with Dr. Eyman, including failing to keep appointments.

The Board is mindful of the importance of a good patient/physician relationship in order for treatment to be successful, especially psychiatric treatment. Nevertheless, our Workers Compensation Act gives the employer control of the selection of medical providers. There are procedures for changing physicians when treatment is unsatisfactory, and the ALJ may authorize treatment and designate a physician when necessary treatment is not being provided by the employer. In this case, with prodding by the court, respondent did provide claimant with appropriate treatment, including psychiatric treatment. Claimant preferred treating with Dr. Parks, who was never authorized. Therefore, his bills will not be ordered paid by respondent as authorized medical expenses.

CONCLUSION

(1) Claimant is entitled to an award of permanent partial disability compensation based upon a 30 percent loss of use of his right upper extremity at the level of the forearm. He has no additional permanent impairment of function either as a result of the harvesting of bone from his iliac crest or as a result of any psychiatric condition that is directly traceable to the work-related physical injury.

(2) The medical treatment expenses claimant incurred with Dr. Gilbert Parks were unauthorized. Respondent is not liable for paying those expenses as authorized medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated April 26, 2010, is modified to correct a multiplication error in the Award calculation but is otherwise affirmed.

The compensable weeks are computed as follows:

200 weeks on the schedule minus 65.57 weeks of temporary total disability equals 134.43 times 30 percent of disability = 40.33 number of compensable weeks.

Claimant is entitled to 65.57 weeks of temporary total disability compensation at the rate of \$417 per week in the amount of \$27,342.69, followed by 40.33 weeks of permanent partial disability compensation at the rate of \$417 per week in the amount of \$16,817.61, for a 30 percent loss of use of the right forearm, making a total award of \$44,160.30.

¹⁰ ALJ's correspondence to parties (Aug. 10, 2007); ALJ Order (Aug. 22, 2007) at 1.

IT IS SO ORDERED.

Dated this _____ day of August, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge